

¹ In its Notice of Appeal, respondent raised an issue as to whether claimant was an employee of respondent on the date of the alleged injury. However, in its Preliminary Hearing Appeal Brief of Respondent and its Insurance Carrier, respondent conceded that claimant was employed by respondent at all times relevant to his claim of accidental injury.

Claimant filed a one-sentence long brief on August 8, 2006, asking that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant began work as an iron foreman for respondent in July 2005. Although claimant's Application for Hearing lists a date of accident of October 1, 2005,² during direct examination at the March 14, 2006, Preliminary Hearing, he stated that the date of accident was, instead, September 28, 2005. On cross-examination, however, after listening to a tape recording of a telephone call he made to respondent on September 8, 2005, he stated that his date of accident would have been September 6 or 7, 2005, which also would have been his last day of work for respondent. The ALJ found September 7, 2005, to be the date of accident.

On the date of claimant's alleged accident, his crew was having problems with a steel panel. In order to assist the crew, he stood with his legs spread out and his arms over his head while prying on a 4,000-pound piece of steel with a pry bar. When the panel was finally in place and bolts were placed in the holes, he stepped down and immediately felt a strain in his low back a little above his belt line. He testified it was not a sharp pain but was more like a burning sensation. This occurred about 2:00 in the afternoon. Claimant had already been scheduled to leave work early that day to take his sister to the airport, so he left work soon after the accident.

The morning after the accident, claimant was working at home on his pickup truck when the hood of the pickup came down and struck his head and neck. It did not strike his low back. Sandra Webber, respondent's timekeeper, had come to his house to pick up his keys. Ms. Webber arrived soon after the pickup hood had fallen on claimant, and he told her that he was really sore from the hood falling on him and that he had been sore to start with. He testified that he told Ms. Webber about the incident the day before while prying on the piece of steel. He admits that Ms. Webber was not his supervisor and that he knew he should report workers compensation injuries to either his supervisor or to the safety people.

Later, possibly in October, claimant went to the Veterans Administration Hospital (VA) and received some Ibuprofen and was told to return at a later date. However, the waiting period was long, and on October 21, 2005, claimant went to the emergency room of another hospital, complaining of constant back pain radiating into his left knee. He indicated that his legs went numb, his knees gave out, and he fell. He especially

² Form K-WC E-1 Application for Hearing filed January 3, 2006.

complained of pain in his left knee, indicating it felt like a “hot poker” in that knee.³ Claimant was prescribed pain medication, including Lortab and Skelaxin. Claimant testified that when he visited the emergency room on this date, he was not thinking about whether his problems were work related; he was hurting and scared because he had fallen.

On October 27, 2005, claimant returned to the emergency room because he was still having low back pain and was out of pain medication. He requested more Lortab in a higher dose. Claimant testified that at that time he was given a slip from the hospital indicating that the injury he sustained could have come from work. Claimant testified he gave this slip to personnel at respondent. He admitted that this was the first time he advised respondent that he thought this was a work-related condition but stated he did not think he had a work-related injury until then. He stated that if respondent’s records indicate he notified them on November 1, 2005, that he had a work-related injury, this would be consistent with his testimony.

On this October 27 emergency room visit, claimant requested that he be referred to a doctor rather than having to return to the hospital for treatment. He was referred to Dr. Jason Williams, whom he saw for the first time on November 1. Claimant testified that Dr. Williams’ office indicated to him that they would fax an off-work slip to respondent.

An MRI was performed on claimant on November 28, which showed mild degenerative change with moderate loss of signal of the L4-5 disc. There was no evidence of disc herniation or stenosis. Dr. Williams advised claimant to try physical therapy, and on December 8, 2005, claimant was released to return to normal activities. Claimant testified that he continues to see Dr. Williams, and that the physical therapy was discontinued because it was not accomplishing anything.

During cross-examination, claimant was told that his last day of work for respondent was September 7, 2005. Respondent also entered as evidence a tape recording of claimant’s telephone message to respondent of September 8, 2005, in which claimant said he had worked on his car the day before and in doing so had twisted wrong or pulled something and injured his back. Claimant testified this phone message was made after the truck hood fell on him. He also admitted that his date of injury would have been September 6 or 7 and that he did not take the slip indicating his condition could be work related to respondent until November 1.

Claimant admitted he was unsure of his dates. He testified that he originally thought all his pain stemmed from the hood coming down on him as it was in his neck and upper back. He did not want to claim that his condition was work-related if it was not. However, his neck healed up, but he was still not getting better. He started having pain going down first in his left leg and then into his right leg. When his leg started going numb, he went to the emergency room. At that point, he knew his problem was not in his neck. Even so, it

³ P.H. Trans., Cl. Ex. 1 at 44.

was not until November 1 before claimant advised respondent that his condition was work related.

Claimant states that he felt something in his low back when he suffered the alleged accident on what he now believes was September 6 or 7. He also says that he felt low back pain and stiffness before working on his truck and that he only injured his head, neck and upper back when the hood of his truck fell on him. Yet claimant also contends that there was just cause for his failure to report his work injury within ten days because he was unaware that the low back injury occurred at work and was not due to the truck hood falling on his head. And it was only when a doctor explained to him that he could not have injured his low back by having a truck hood land on his head that claimant was able to make the connection between the incident at work and his low back condition. Claimant's explanation for his failure to give notice within ten days is not persuasive. Furthermore, claimant said on the recorded message of September 8 that he injured his low back while working on his truck.

. . . I had to work on my truck yesterday and in doing so I twisted wrong or pulled something or something. And I am down on my back really bad. I can't hardly—I could barely crawl out of bed and barely, just walk to the bathroom.⁴

The Board finds claimant has failed to prove just cause for not giving notice of accident within ten days. Accordingly, his claim is barred.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 19, 2006, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier

⁴ P.H. Trans. at 36.